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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0996**

State of Minnesota,
Respondent,

vs.

Timothy Gordon Deflorin,
Appellant.

**Filed May 14, 2018
Affirmed
Hooten, Judge**

Washington County District Court
File No. 82-CR-15-5163

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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Attorney, Stillwater, Minnesota (for respondent)

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Mark D. Nyvold, Fridley, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Randall,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant challenges the district court's denial of his motion for a new trial after a jury convicted him of first- and second-degree criminal sexual conduct. He argues that the district court plainly erred by failing (1) to instruct the jury that it must unanimously decide which acts constituted criminal sexual conduct and (2) to intervene during the prosecutor's rebuttal argument after the prosecutor referenced statements made during jury selection and disclosed her own personal opinion. We affirm.

FACTS

In November 2015, the state charged appellant Timothy Gordon Deflorin with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2014), and one count of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2014). The criminal complaint alleged that Deflorin engaged in unlawful sexual contact with M.B. "on or about" May 14, 2003. The probable cause statement in the complaint further described the alleged criminal sexual conduct that occurred on May 14, 2003, as well as other incidents of sexual misconduct that happened before that date in Deflorin's truck. The case proceeded to jury trial in December 2016.

At trial, M.B., an 18-year-old woman, testified that when she was a child, she attended an in-home daycare near her house in Forest Lake. Deflorin was the daycare provider's husband and saw M.B. at least once a week and would occasionally take her on errands with him in his truck. Beginning when M.B. was about four years old, Deflorin sexually assaulted her inside the truck. M.B. stated that he would lay her down across the

seat of the truck, take off her clothes, and insert his penis into her vagina. She said that this occurred several times. Deflorin often bought M.B. treats and toys afterwards and would tell her that she was his angel.

M.B. also testified that the last time Deflorin sexually assaulted her was on her fifth birthday, May 14, 2003. When M.B. arrived at daycare that day, Deflorin took her to the second-floor bathroom. Deflorin shut the bathroom door and turned on the shower. He then penetrated her vagina with his penis. M.B. suffered vaginal bleeding from the incident. Deflorin tried to calm her, telling her that it would be okay. He then inserted his penis into M.B.'s anus and then into her vagina until he ejaculated. Deflorin told M.B. that he was proud of her and gave her a toy for her birthday.

M.B. testified that she did not tell anyone about the incidents until she was in tenth grade. After attending inpatient treatment for anxiety and depression, she began to use marijuana and alcohol. She also developed flashbacks to the abuse and experienced night terrors and pseudo seizures. In July 2015, child protection services received a report regarding the allegations of abuse and referred the matter to the Forest Lake Police Department. After completing an investigation, police arrested Deflorin.

Near the end of trial, and after M.B. had testified, the prosecutor requested, outside the presence of the jury, to amend the criminal complaint from stating "on or about" May 14, 2003 to "on or before" May 14, 2003 as the alleged date of the offense. Deflorin objected to the request, arguing that the "on or about" language was in clear reference to the bathroom incident rather than other instances of sexual assault. The district court granted the prosecutor's request and instructed the jury that to find Deflorin guilty, it must

find that his act of criminal sexual conduct “took place on or before May 14th, 2003.” The district court also gave a standard unanimity instruction: “In order for you to reach a verdict, whether guilty or not guilty, each juror must agree. Your verdict must be unanimous.” Deflorin did not ask for a specific unanimity instruction.

During rebuttal closing argument, the prosecutor referred the jury to answers provided in jury selection by potential jurors regarding others’ experiences of being abused as a child but reporting the abuse years later. The prosecutor also told the jurors to rely on their own experiences and common sense in evaluating the evidence. Deflorin did not object to the prosecutor’s argument. The jury later found Deflorin guilty of both charges.

Deflorin moved for a new trial, arguing that the district court erred by failing to give a specific unanimity instruction after amending the state’s criminal complaint to provide that the date of the offense was “on or before” May 14, 2003. He also argued that the prosecutor committed misconduct during rebuttal closing argument by mentioning answers during jury selection about delayed reporting of abuse. The district court held a hearing in March 2017 to address the motion and later issued an order denying it. This appeal followed.

D E C I S I O N

I.

Deflorin challenges his convictions, arguing that the district court deprived him of his right to a unanimous verdict by failing to issue a specific unanimity instruction to the jury. “The jury’s verdict must be unanimous in all cases.” Minn. R. Crim. P. 26.01, subd. 1(5). But the jury does not need to agree unanimously as to the alternative means or ways

in which a crime is committed. *State v. Rucker*, 752 N.W.2d 538, 547 (Minn. App. 2008), review denied (Minn. Sept. 23, 2008). And specific dates are typically not necessary to prove charges of criminal sexual conduct that extend over a period of time. *Id.*

The state initially charged Deflorin with first- and second-degree criminal sexual conduct for an act that occurred “on or about” May 14, 2003. On the first day of trial, M.B. testified that Deflorin sexually assaulted her multiple times in his truck and also in his bathroom on her fifth birthday. Deflorin did not object to this testimony but cross-examined her extensively as to its accuracy. Near the close of trial, the prosecutor moved to amend the complaint to allege that the offense occurred “on or before” May 14, 2003. Over Deflorin’s objections, the district court granted the prosecutor’s request, stating that “it’s reasonable to argue or conclude from the evidence the way the case was tried, that if the jury believes these other events, they have to conclude that they happened before [M.B.’s] fifth birthday.” Accordingly, the district court gave instructions to the jury that it must decide if Deflorin committed criminal sexual conduct “on or before” May 14, 2003.

A defendant typically waives a challenge to jury instructions on appeal if he fails to propose a specific jury instruction to the district court. *State v. Hersi*, 763 N.W.2d 339, 342 (Minn. App. 2009). But he can preserve the claim by raising it in a motion for new trial. *See State v. Glowacki*, 630 N.W.2d 392, 398 (Minn. 2001). Deflorin frames the issue on appeal as whether the district court abused its discretion by denying his motion for a new trial, but he primarily analyzes the issue in the framework of whether the district court committed plain error. Because Deflorin did not ask for a specific unanimity instruction during trial, we review the jury instructions for whether (1) an error exists, (2) the error is

plain and obvious, and (3) the error affects his substantial rights. *See State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015). If he meets these three prongs, we may reverse his conviction to correct the error only if it has an effect on “the fairness, integrity, or public reputation of judicial proceedings.” *See State v. Crowsbeast*, 629 N.W.2d 433, 437 (Minn. 2001) (quoting *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997)).

Deflorin argues that the district court erred by failing to instruct the jury that it must reach a unanimous verdict after the state presented evidence of two distinct sexual-conduct offenses. He asserts that by changing the language in the complaint from “on or about” May 14, 2003 to “on or before” May 14, 2003, the state broadened the timeframe and made it possible for the jury to convict him for acts of sexual conduct that occurred in his truck sometime before M.B.’s fifth birthday on May 14, 2003. Relying significantly on *State v. Stempf*, Deflorin argues that M.B.’s description of several specific acts of penetration—both occurring in his truck and on May 14, 2003 in his bathroom—created the possibility of “significant disagreement among [the] jurors” as to which illegal acts he committed. *See* 627 N.W.2d 352, 354 (Minn. App. 2001). The state disagrees, claiming that this case is more similar to this court’s decision in *Rucker* because M.B.’s testimony focused on one specific act of sexual assault—the incident in Deflorin’s bathroom on her birthday—and that the incidents in Deflorin’s truck were examples of Deflorin’s conduct, not distinct allegations of abuse. *See* 752 N.W.2d at 548.

While we tend to agree with the state that this case draws more similarities to *Rucker* than *Stempf*, we need not decide whether the district court erred by failing to give a specific unanimity instruction because our review of the record leads us to conclude that any alleged

error regarding the lack of this instruction did not affect Deflorin's substantial rights. An error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). For an error to be prejudicial, there must be a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). Deflorin bears a "heavy burden" in proving that an error affected his substantial rights. *See id.*

The state refers us to the *Wenthe* case to support its assertion that any possible error could not have affected Deflorin's substantial rights. In *Wenthe*, the state charged the defendant, a priest, for having a sexual relationship with a parishioner in violation of the single-meeting clergy sexual conduct statute. *Wenthe*, 865 N.W.2d at 297. The defendant and the victim developed a close friendship and began spending time together in social settings while discussing the prospect of a sexual relationship. *Id.* Both the defendant and the victim testified that they met in the evening on November 13, 2003 and that the defendant sexually penetrated her. *Id.* The defendant and the victim disagreed regarding whether the defendant sexually penetrated her when meeting the following day. *Id.* They continued to have a sexual relationship for about one year. *Id.* At trial, the district court did not instruct the jury that they must unanimously agree as to which meeting violated the statute. *Id.*

The *Wenthe* court did not explicitly decide whether the lack of specific unanimity instruction constituted plain error "because the alleged error did not affect [the defendant's] substantial rights." *Id.* at 299. It concluded that there was a reasonable likelihood at least

one of the meetings involved both sexual contact and spiritual counsel in violation of the statute. *Id.* at 300. The *Wenthe* court reasoned that, on the one hand, the jury could reasonably conclude that the defendant violated the statute at the November 13 meeting but not at a later meeting. *Id.* But that, on the other hand, it was not reasonably possible for some jurors to conclude that he violated the statute on a later meeting but not the November 13 meeting. *Id.* We agree with the state that this case is comparable to *Wenthe* because it is not reasonably likely that the jury, in assessing the credibility of M.B. and Deflorin, found that Deflorin sexually penetrated M.B. in his truck but not in his bathroom.

Contrary to Deflorin's assertions, the state presented substantial evidence of guilt. The outcome of trial depended much on the jury's assessment of M.B.'s credibility. Despite Deflorin's attempts to highlight inconsistencies in M.B.'s testimony, M.B. provided extensive detail about the incidents during which he sexually penetrated her, particularly the assault that occurred on her fifth birthday. She described how the assault occurred and then explained that Deflorin tried to console her afterwards. M.B.'s mother recalled that when M.B. returned home later that day, her demeanor was quiet and that she said that she never wanted to wear the same outfit that she had worn on her birthday.

And many aspects of M.B.'s testimony were corroborated by other witnesses. For instance, M.B. testified that Deflorin would often buy her gifts and call her his angel after he sexually penetrated her. Her mother testified that one of the toys he had given her was a stuffed bear dressed as an angel. And the forensic interviewer explained that a sexual abuser may take efforts to befriend the child and normalize the abuse by buying her gifts and giving her special nicknames.

In an effort to discredit M.B.'s account of the events, he emphasized the fact that she had a serious alcohol and drug problem. But the forensic interviewer testified that many children who experience sexual trauma may experience headaches and nightmares and get involved in drugs and alcohol.

For these reasons, and consistent with the post-trial analysis of the jury verdict in *Wenthe*, we conclude that it is not reasonably likely that the lack of a specific unanimity instruction had a significant impact on the jury's verdicts.

II.

Deflorin next argues that the prosecutor committed prosecutorial misconduct in her rebuttal closing argument at trial. He did not object to the prosecutor's statements and therefore we review the alleged misconduct under a modified plain-error standard. See *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014). Similar to the specific unanimity instruction issue, Deflorin mentions the abuse of discretion standard due to the district court's denial of his new trial motion but primarily incorporates a plain-error analysis in discussing the issue of prosecutorial misconduct. He must establish that the error is plain because it "contravenes case law, a rule, or a standard of conduct." See *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If Deflorin demonstrates plain error, the burden shifts to the state to show that the misconduct did not affect his substantial rights because "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." See *id.* (quotation omitted). If the state is unable to meet this burden, we must decide "whether the error seriously affected the

fairness, integrity, or public reputation of judicial proceedings.” *State v. Vue*, 797 N.W.2d 5, 13 (Minn. 2011).

Deflorin claims that the prosecutor’s rebuttal argument to the jury amounted to multiple examples of prosecutorial misconduct. He specifically contests the following portion of the prosecutor’s rebuttal argument:

I know [defense] counsel focuses a lot on this lack of physical evidence. Like I said, this happened in 2003. There wasn’t a doctor that did an exam of [M.B]. We don’t have this physical evidence. And [the forensic interviewer] testified that it’s extremely common for kids to not report[] things until many years later. In fact, in jury selection, a lot of people talked about that. A lot of people talked about people they knew that reported years later that they had been abused as a child. Or friends in college that had been abused, and they didn’t say anything about it until later, and then never actually reported it to the police. So I think even in your experiences, your common sense experience, things you have experienced, it’s my understanding that people have seen that, and it does happen. [The forensic interviewer] says it’s very common.

During jury selection, several prospective jurors spoke about their experiences regarding sexual abuse.

First, Deflorin insists that the prosecutor’s comments were inappropriate because they were not limited in scope to his closing argument. He asserts that it was unnecessary and unfair for the prosecutor to discuss the jurors’ answers from jury selection because his defense counsel never mentioned these answers during his closing argument. A prosecutor may make a rebuttal argument during closing that is in “direct response to the defendant’s closing argument.” Minn. R. Crim. P. 26.03, subd. 12(j). While Deflorin did not specifically raise the jurors’ answers during jury selection in closing argument, he did

challenge M.B.'s credibility, particularly her delay in reporting the incidents. Deflorin's counsel argued, "[M.B.] claims that she's always recalled, at least in her statement, she says she has always recalled this. But the conduct isn't reported to law enforcement until 12 years later. 12 years later." In light of the entire closing argument, the prosecutor's rebuttal—which emphasized the jury's own knowledge and experiences of delayed reporting—was in direct response to Deflorin's attack on M.B.'s credibility, and therefore it did not constitute prosecutorial misconduct. See *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009) (stating that a "prosecutor has the right to fairly meet the arguments of the defendant").

Second, Deflorin argues that the prosecutor went outside the trial record by referring to statements given during jury selection on the subject of delayed reporting. His argument depends primarily on A.B.A., *Criminal Justice Standards for the Prosecution Function*, §§ 3-6.8(a), 3-6.9 (4th ed. 2015). A prosecutor has "considerable latitude" in how she performs her closing argument, *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998), and the prosecutor may "argue all reasonable inferences from the evidence in the record," *Criminal Justice Standards for the Prosecution Function*, *supra*, § 3-6.8(a). But, "the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which a court clearly may take judicial notice." *Id.*, § 3-6.9. While Deflorin asserts that jury selection occurred before trial and cannot be construed as part of the trial record, he does not cite to any relevant authority to support this assertion. And, contrary to his assertion, Minnesota caselaw indicates that the trial record includes

jury selection. See *State v. Bolstad*, 686 N.W.2d 531, 542 (Minn. 2004) (stating that in evaluating misconduct claims, Minnesota courts review “the full trial record,” and then analyzing questions during voir dire).

Third, Deflorin suggests that the prosecutor’s discussion of the prospective jurors’ statements improperly evoked a sympathetic stance towards M.B. that hindered the jury’s ability to assess her credibility. When reviewing alleged misconduct in closing argument, we evaluate the whole argument in context, not isolated phrases or remarks. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). “Sexual-abuse cases inevitably evoke an emotional reaction, and any attempt by the prosecutor to exacerbate this natural reaction by making any emotive appeal to the jury is likely to be highly prejudicial.” *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003) (quotation omitted).

Jurors may use their own experiences and common sense in determining whether a witness’s testimony is credible. *State v. Jones*, 753 N.W.2d 677, 692 (Minn. 2008). But the prosecutor may not request that the jurors “put themselves in the shoes of the victim,” *State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982), or “look at their own experiences as proof that the defendant’s defense is not credible,” *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994). In *State v. Bauer*, the defendant argued that the prosecutor made several improper statements to the jury. 776 N.W.2d 462, 475 (Minn. App. 2009), *aff’d*, 792 N.W.2d 825 (Minn. 2011). The prosecutor in *Bauer* made the following statements:

[W]hen I first spoke to you during the jury selection process, I asked several of you what you would do if somebody called you and asked you to sell them drugs, and everyone that was asked said they’d hang up the phone and I believe one person even said they’d call the cops.

....

Think about that for a minute. If this was the only time that [the defendant] ever sold drugs, is it reasonable to believe that he just cannot remember where he got those drugs. Come on. You do something stupid and you realize it after the fact and you don't think and rethink that even in your own mind? Is that reasonable to believe?

Id. This court acknowledged that the prosecutor could urge the jury to rely on common sense but concluded that the prosecutor committed misconduct by asking the jurors to use their answers from jury selection to help determine the credibility of the defendant's defense. *Id.* Similar to *Bauer*, the prosecutor in this case did make references to the jurors' answers in jury selection. But unlike *Bauer*, the prosecutor invited the jury to use these answers and their own common sense to evaluate the credibility of the victim's testimony, not the credibility of Deflorin's defense. *See id.* (citing *Williams*, 525 N.W.2d at 549). We therefore conclude that the prosecutor intended for the statement to direct the jurors to use their own experience and common knowledge rather than to intensify their emotional reaction to the case.

Fourth, Deflorin argues that the prosecutor asserted her own credibility by stating, in reference to delayed reporting, "So I think even in your experiences, your common sense experience, things you have experienced, it's my understanding that people have seen that, and it does happen." The prosecutor commits error if she offers her own personal opinion about the credibility of a witness. *State v. Mayhorn*, 720 N.W.2d 776, 786 (Minn. 2006). The "personal opinion rule" is designed to prevent a prosecutor "from becoming an unsworn witness and otherwise personally attaching himself or herself to the cause which he or she represents." *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991). But the

prosecutor's use of the first-person in this instance does not express a personal evaluation of the evidence, particularly M.B.'s credibility. *See State v. Washington*, 725 N.W.2d 125, 134 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). Rather, when read in the context of the full sentence, the prosecutor was referring to the jurors' experiences, not her own experiences. The prosecutor did not inject her own personal opinion into the rebuttal argument.

For these reasons, we conclude that the district court did not plainly err by determining that the prosecutor did not commit prosecutorial misconduct during her rebuttal closing argument. The district court did not abuse its discretion by denying Deflorin's motion for a new trial.

Affirmed.